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THE DELEGATION OF LEGISLATIVE POWER BY CONGRESS TO THE STATES

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It is an essential theory of our constitutional system that the relations between the Union and the States are determined by the Constitution of the United States, and hence that the powers of the government of the one may be neither increased nor diminished (except in the few instances provided for in the Constitution) by the action of the government of the other. How far this theory has been actually embodied in law it is important to inquire in regard to all three functions of government, legislation, jurisdiction, and administration, but the present discussion will be limited to illustrations of the delegation of legislative power by congress to the States. The acts of congress with which we are here concerned form three distinct classes: those involving the concurrent powers of the States which may be exercised in the absence of conflicting congressional legislation; those involving powers of the States which may be exercised only by reason of some positive action of congress; and, last, a class in which there is an adoption of laws of the States as laws of the United States.

I

Of course when the powers of congress and of the States are clearly concurrent, acts of congress purporting to confer powers on the State legislatures can be regarded as no more than the recognition of powers

already existing in the States, but it may be difficult to determine whether or not an act belongs to this class of legislation.

Of the various acts of congress of this kind that which has caused the most difficulty is the act of the first congress in reference to pilots,[1] which provides that "until further provision is made by congress, all pilots * * * shall continue to be regulated in conformity with the existing laws of the States respectively wherein such pilots may be, or with such laws as the States may respectively enact for the purpose." In the consideration of this act all the principles involved in the delegation of legislative power to the States have been discussed by the courts. Chief Justice Marshall, in commenting on the act in Gibbons v. Ogden,[2] says: "Although congress cannot enable a State to legislate, congress may adopt the provisions of a State on any subject. When the government of the Union was brought into existence, it found a system for the regulation of its pilots in full force in every State. The act * * * adopts this system, and gives it the same validity as if its provisions had been specially made by congress. But the act, it may be said, is prospective also, and the adoption of laws to be made in future, presupposes the right in the maker to legislate on the subject. The act unquestionably manifests an intention to leave this subject entirely to the States, until congress should think proper to interpose; but the very enactment of such a law indicates an opinion that it was necessary; that the existing system would not be applicable to the new state of things, unless expressly applied to it by congress. * * * The acknowledged power of a State to regulate its police, its domestic trade, and to govern its own citizens, may enable it to legislate on this subject to a considerable extent; and the adoption of its system by congress, and the application of it to the whole subject of commerce does not seem to the court to imply a right in the States so to apply it of their own authority. But the adoption of the State system being temporary * * * shows, conclusively, an opinion that congress could control the whole subject, and might adopt the system of the States, or provide one of its own." This act and the acts recognizing the validity of State health laws,[3] and certain other acts, he thinks show

[1] Act of Aug. 7, 1789, ch. 9, 1 Stat. L. 53, Rev. Stats., sec. 4235.
[2] 9 Wheat. 1, 6 L. Ed. 23, 73 (1824).
[3] Below, p. 375.

an opinion of congress "that the States retain powers enabling them to pass the laws to which allusion has been made."

Does such language not mean that the pilot regulations owe their validity *both* to their adoption by congress and to the inherent powers of the States? In the License Cases,[4] Chief Justice Taney, while maintaining that "congress had the power, by assenting to the State laws then in force, to make them its own," declares that, "as to all future laws by the States, if the Constitution deprived them of the power of making any regulations on the subject, an act of congress could not restore it," and he bases the validity of the changes in the State legislation made since the passage of this act of congress upon the inherent powers of the States.[5] This acknowledges in effect a right in the States to annul a law of the United States. This objection was later urged in Cooley v. Board of Wardens in the dissenting opinion of Justice McClean,[6] who had previously held, in the Passenger Cases,[7] that the pilot laws do not derive their validity from the States, but from the act of congress making them laws of the United States, and that hence, on the analogy of the construction of the "process acts,"[8] any changes in these regulations by the States can have no force in regard to federal action. But in the leading case of Cooley v. Board of Wardens,[9] the court renews the distinction between "the then existing State laws," which are given the force of an act of Congress "so long as they should continue unrepealed by the State which enacted them," and the regulations made subsequent to the act of congress, whose authority is due to the inherent powers of the States. The act of congress is not "an attempt to confer on the States a power to legislation," but "manifests the understanding of congress * * * that the nature of this subject is not such as to require its exclusive legislation.[10] Thus the court in effect justifies the repeal of a law of congress by the action

[4] 5 How. 504, 12 L. Ed. 256, 290 (1847).

[5] To the same effect in Low v. Commrs., Charlt. 302, 314 (1830). The difficulty was mentioned, but avoided, in Hobart v. Drogan, 10 Pet. 108, 9 L. Ed. 363, 368 (1836), and *The Wave*, Fed. Cas., No. 17, 300, p. 467 (1827–40).

[6] 12 How. 299, 13 L. Ed. 996, 1006 (1851).

[7] 7 How. 283, 12 L. Ed. 702, 752 (1849).

[8] Below, pp. 364-5.

[9] 12 How. 299, 13 L. Ed. 996, 1004 (1851).

[10] To the same effect in Banta v. McNiel, Fed. Cas., No. 996, p. 764 (1871).

of a State. But since this decision was announced the courts have almost always omitted any references to "adoption," which has caused so much confusion, and have either relied entirely on the inherent powers of the States or have upheld the regulations on precedent without giving the grounds of decision. The view is thus expressed in *The Panama:*[11] "Neither was the act of 1789 a grant of power from congress to the States. * * * The power is concurrent in the State and national government until exercised by the latter, when so far as exercised it becomes exclusive. If the power was exclusively in the national government, congress could not grant it to the States, and being concurrent it could not or need not." However, the court considers that this view "is in substantial concordance with the doctrine of Cooley v. Board of Wardens * * * that the act of 1789 is a mere legislative recognition of the concurrent power of the States over this subject so long as Congress does not act in the matter."[12] But what has been thus gained in consistency in one direction has been lost in another. For the federal courts have always assumed a concurrent jurisdiction in cases arising under such State legislation on account of its maritime character, in direct contradiction of the principle that the admiralty and maritime powers of congress are exclusive. And although the courts at times have attempted to show such action to be consistent, it seems now to be generally admitted that the practice is illogical and to be justified only on account of long usage.[13]

The concurrent power of the States to regulate the militia while under their jurisdiction, recognized at an early period by the courts,

[11] Fed. Cas., No. 10, 702, p. 1070 (1861).

[12] To the same effect in Edwards v. *S. S. Panama,* 1 Ore. 418, 424 (1861). See also Utica v. Churchill, 33 N. Y. 161, 242 (1865), ex parte McNiel, 13 Wall, 236, 20 L. Ed. 624, 626 (1871); ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717, 722 (1879); Wilson v. McNamee, 102 U. S. 572, 26 L. Ed. 324 (1881); *The Glenearne,* 7 Fed. 604, 606 (1881); *The Chase,* 14 Fed. 854, 855 (1882). But "adoption" appears again in Cribb v. State, 9 Fla. 409, 419 (1861), and Banta v. McNiel, above, note 10. In *The Clymene,* 9 Fed. 164, 166 (1881), it is said that the act of 1789 "adopted the existing laws of the States * * * and provided for the adoption of such others as they might thereafter make."

[13] Hobart v. Drogan, 10 Pet. 108, 9 L. Ed. 363, 367 (1836); ex parte McNiel, 13 Wall. 236, 20 L. Ed. 626 (1871); *The Lottawanna,* 21 Wall. 558, 22 L. Ed. 654, 663 (1875); *The Manhasset,* 18 Fed. 918, 927 (1884); Welsh v. North Carolina, 40 Fed. 655, 656 (1889); *The City of Norwalk,* 55 Fed. 98, 108 (1893).

has been recognized by congress since its enactment of the first statute in reference to the militia. The militia act of 1792[14] provides that "all persons who now are or may hereafter be exempted by the laws of the respective States" shall be exempted from militia duty; and according to the law of 1903[15] "all persons who are exempted by the laws of the respective States or Territories shall be exempted from militia duty." Further the law of 1792[16] provides that the militia of the respective States shall be arranged into divisions, etc., "as the legislature of each State shall direct." Although an opinion of the justices of Massachusetts[17] regards this authority of the States as "the power thus conferred upon the State legislatures by this act of congress" (the justices offer no objection to such *conferring* of power), it would seem that there is here no attempt to delegate power to the States, but only a recognition of an inherent State power.[18] And the same may be said[19] of acts of congress which relate to the State health and quarantine laws[20] so far as their general application is concerned.

II

Upon the subjects above considered there is a concurrent power of the States to legislate in the absence of inconsistent federal legislation. But there are other subjects in reference to which legislative powers of the States are held to become operative only on account of some positive action on the part of congress.

The currency act of 1864[21] directs that nothing in the act shall prevent the shares in any national banking association from being taxed as personal property by the States, but that the State legislatures

[14] Act of May 8, 1792, ch. 33, sec. 2, 1 Stat. L. 271. Cf. Annals of Congress, 1791–3, pp. 418–21.

[15] Act of Jan. 21, 1903, ch. 196, sec. 2, 32 Stat. L. 775.

[16] Act of May 8, 1792, ch. 33, sec. 3, 1 Stat. L. 271, Rev. Stats., sec. 1630.

[17] 22 Pick. 571, 575 (1839).

[18] Cf. People v. Hill, 126 N. Y. 497, 505 (1891); 36 Cong. Rec. 779–81 (1903).

[19] Gibbons v. Ogden, 9 Wheat. 1, 6 L. Ed. 23, 72 (1824); Brown v. Maryland, 12 Wheat. 420, 6 L. Ed. 678, 687 (1827); License Cases, 5 How. 504, 12 L. Ed. 256, 291 (1847). But see below, pp. 352 and 357.

[20] Below, p. 375.

[21] Act of June 3, 1864, ch. 106, sec. 41, 13 Stat. L. 99, Rev. Stats., sec. 5219.

shall have authority over the matter, subject to certain restrictions. The necessity for this enactment lay in the principle of immunity of instruments of the federal government from State taxation, established in McCulloch v. Maryland,[22] although opinion in congress was divided as to whether such taxation came within the principle of that decision.[23] Assuming such to be the case, it was there contended that such power of taxation can be exercised by congress alone and cannot be delegated to the States;[24] that the States may exercise such a power with the *consent* of congress;[25] that such consent "is not conferring any power upon the State, but the general government simply lets go of an exemption" heretofore enjoyed by such instruments; that this power of taxation "does not come by grant from the general government, but it resides in the States."[26] The constitutionality of the act was soon contested, but maintained, in Van Allen v. Assessors:[27] "It is said that congress possesses no power to confer upon a State authority to be exercised which has been exclusively delegated to that body by the Constitution and, consequently, that it cannot confer upon a State the sovereign right of taxation; nor is a State competent to receive a grant of any such power from congress. We agree to this. But as it respects a subject-matter over which congress and the States may exercise a concurrent power, but from the exercise of which congress, by reason of its paramount authority, may exclude the States, there is no doubt congress may withhold the exercise of that authority and leave the States free to act. An example of this relation existing between the federal and State governments is found in the pilot-laws of the States, and the health and quarantine laws." In applying this decision in Stetson v. Bangor[28] the State court says: "If the States possess this power at all, it is in virtue of their inherent authority as States of the United States," and not on account of any "enabling act of congress."

A principle previously stated in the dissenting opinion of Chief

[22] 4 Wheat. 316, 4 L. Ed. 579 (1819).
[23] Cong. Globe, 1863-4, especially pp. 1393, 1893–9, 1957.
[24] *Ibid.*, 1394.
[25] *Ibid.*, 1891, 1895–6, 1899.
[26] *Ibid.*, 1959. See also *ibid.*, 1957.
[27] 3 Wall. 573, 18 L. Ed. 229, 235 (1865).
[28] 56 Me. 274, 284 (1868).

Justice Chase in Van Allen v. Assessors,[29] was developed further by Justice Miller for the court, in National Bank v. Commonwealth:[30] The principle of McCulloch v. Maryland "has its limitation, a limitation growing out of the necessity on which the principle itself is founded. That limitation is, that the agencies of the federal government are only exempted from State legislation, so far as that legislation may interfere with, or impair their efficiency in performing the functions by which they are designed to serve that government." It would thus seem that even under the interpretation of the Constitution in McCulloch v. Maryland, the States possess an inherent power to impose this tax, and that the act of congress was wholly unnecessary in this respect. But the same judge, in delivering the opinion of the court in People v. Weaver,[31] says that this provision "was necessary to authorize the States to impose any tax whatever on these bank shares," and speaks of congress as "conferring a power on the States which they would not have otherwise had," as "permitting the States to tax these shares." And the supreme court continues to speak of this "consent of congress," of this "grant" to the States, of this "permissive legislation of congress."[32] We have thus much confusion of thought, which is found also in reference to other acts of congress embodying the same principle.

Although, under the doctrine of the decisions in McCulloch v. Maryland[33] and Weston v. Charleston,[34] the obligations of the United States may not be taxed by the States, it has been until recently the practice of congress expressly to exempt such obligations from State taxation.[35] But a change in policy came with an act of 1894,[36] whereby national

[29] 3 Wall. 573, 18 L. Ed. 229, 238 (1865). See also Utica v. Churchill, 33 N. Y. 161, 242 (1865).

[30] 9 Wall. 353, 19 L. Ed. 701, 703 (1869).

[31] 100 U. S. 539, 25 L. Ed. 705, 706 (1880).

[32] Farmers' and Mechanics' Nat. Bank v. Dearing, 91 U. S. 29, 23 L. Ed. 196, 199 (1875); Mercantile Bank v. New York, 121 U. S. 138, 30 L. Ed. 895, 901 (1887); Talbot v. Silver Bow Co., 139 U. S. 438, 35 L. Ed. 210 (1891); Owensboro Bank v. Owensboro, 173 U. S. 664, 43 L. Ed. 850, 852 (1899).

[33] 4 Wheat. 316, 4 L. Ed. 579 (1819).

[34] 2 Pet. 449, 7 L. Ed. 481 (1829).

[35] E.g., Act of Feb. 25, 1862, ch. 33, sec. 2, 12 Stat. L. 345; Act of July 14, 1870, ch. 256, sec. 1, 16 Stat. L. 272.

[36] Act of Aug. 13, 1894, ch. 281, sec. 1, 28 Stat. L. 278.

bank notes, legal tender notes, etc., are declared to be, with certain restrictions, "subject to taxation * * * under the laws of any State or Territory." Of course the principle involved in this act is precisely the same as that in the taxation of shares of national banks. The constitutionality of the former act has apparently never been questioned in the courts, doubtless on account of the decisions in reference to the latter, but the discussions in congress on the two bills were very similar.[37]

The same principle and the same difficulties are present in several acts relating to the regulation of interstate commerce. The first of these, enacted in 1866,[38] specifies that the provisions of the act regulating the transportation of certain explosives shall not be construed to prevent the States, Territories, or localities from regulating or prohibiting the transportation of these substances within their respective limits or from prohibiting their introduction into such limits for sale, use, or consumption therein. This act has aroused little interest and has been discussed only by way of illustration of other similar laws. In ex parte Jervey[39] the court, after declaring that, the power to regulate interstate commmerce being vested in congress, "it is within the power of congress to permit its exercise in whole or in part by the States," remarks that by the provisions of this act, "congress gives directly to any State * * * the right to prohibit the introduction of such substances for sale, use, or consumption therein," but at the same time inconsistently quotes from Rahrer's case[40] to the effect that the Wilson act "gives the States no new power." It has been maintained in congress that the provision in reference to explosives was unnecessary because of the States' inherent right to protect

[37] 26 Cong. Rec. 7140, 7145, 7170–1, 8209. By the act of 1864 (sec. 30, Rev. Stats., sec. 5197), the national banks are allowed to take interest "at the rate allowed by the laws of the State, Territory, or district where the bank is located." Although the prospective operation of this bill was recognized in congress, there was no contention as to delegation of power, and the validity of State laws passed after this act has often been assumed by the courts, or no comparison of dates made. E.g., Tiffany v. National Bank, 18 Wall. 409, 21 L. Ed. 862 (1873); La Dow v. First National Bank, 37 N. E. (Ohio) 11 (1894); Schlesinger v. Gilhooley, 81 N. E. (N. Y.) 619 (1907).

[38] Act of July 3, 1866, ch. 162, sec. 5, 14 Stat. L. 81, Rev. Stats., sec. 4280.

[39] 66 Fed. 957, 960 (1895).

[40] Below, pp. 357-8.

their people against dangers in virtue of their police power,[41] but this has been answered by the statement that such explosives are as much lawful articles of commerce as are intoxicating liquors.[42]

All these discussions had reference to the Wilson act of 1890,[43] which provides that intoxicating liquors "transported into any State or Territory or remaining therein for use, consumption, sale or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced in original packages or otherwise." This act owes its immediate origin[44] to the "original package" decision in Leisy v. Hardin,[45] although such a decision had been anticipated by a similar bill in the preceding congress.[46] In this case Chief Justice Fuller, for the court, says: "Hence, inasmuch as interstate commerce, consisting in the transportation, purchase, sale and exchange of commodities, is national in its character, and must be governed by a uniform system, so long as congress does not pass any law to regulate it, or allowing the States to do so, it thereby indicates its will that such commerce shall be free and untrammeled. * * * Being thus articles of commerce, can a State, in absence of legislation on the part of congress, prohibit their importation [importation of intoxicants] * * * or when imported prohibit their sale by the importer? * * * The conclusion follows that * * * the States cannot exercise that power [to regulate interstate commerce] without the assent of congress * * * but notwithstanding it is not vested with supervisory power over matters of local administration, the responsibility is upon congress, so far as the regulation of commerce is concerned to remove the restriction upon the States in dealing with imported articles of trade within their limits, which have not been mingled with the common mass of prop-

[41] 21 Cong. Rec. 5324–5 (1890).
[42] *Ibid.*, 5327.
[43] Act of Aug. 8, 1890, ch. 728, 26 Stat. L. 313.
[44] Senate Rpt., 1889–90, No. 993; 21 Cong. Rec. 4642 (1890).
[45] 135 U. S., 100, 34 L. Ed. 128, 132 (1890).
[46] Senate Bill, No. 1067, 20 Cong. Rec., 1882, 1884 (1889).

erty therein. * * * Up to that point of time, we hold that, in the absence of congressional permission to do so, the State had no power to interfere."[47] The Chief Justice had a precedent for the position taken as to the *permission* of congress in the opinion of the court delivered by Justice Mathews in Bowan v. Railway Co.,[48] apparently the earliest case in which there is any suggestion that the power to regulate interstate commerce, vested, according to the court's previous interpretation of the Constitution, exclusively in congress, may, through the action of congress, be exercised by the States.

When the provision was discussed in congress it was justified as giving the "permission" expressly allowed by the dictum of the court in Leisy v. Hardin,[49] as a grant of local option,[50] as a removal of an impediment to the exercise of the police powers of the States,[51] as following the precedent of State taxation of shares of national banks.[52] But the bill was opposed as delegating an exclusive power of congress to the States,[53] and as to the "permission" suggested it was said that "jurisdiction even in the courts is not a matter of consent, but a matter of law," that "when the Constitution has conferred a power upon congress the consent of congress and the States can not take from congress its jurisdiction, nor can the consent of congress and the States confer upon the States a jurisdiction which by the Constitution is conferred upon congress."[54] Senator Hoar's interpretation of the decision in Leisy v. Hardin is of special importance as it expresses principles later announced in Rahrer's case. The court, he said, has not declared that congress "may delegate power to the States. * * *

[47] See the similar reasoning in Lyng v. Michigan, 135 U. S. 161, 34 L. Ed. 150, 153 (1890).

[48] 125 U. S., 465, 31 L. Ed. 700, 707 (1888).

[49] E. g., 21 Cong. Rec. 4642, 4954 (1890); Senate Rpt., 1889–90, No. 993.

[50] 21 Cong. Rec., 4904 (1890).

[51] 20 Cong. Rec., 1885 (1889).

[52] 20 Cong. Rec., 1886; 21 Cong. Rec., 4957 (1890).

[53] E. g., 21 Cong. Rec., 4642, 4956, 5324, 5332 (1890).

[54] *Ibid.*, 4964. Senator Eustis said: 'Call it permission, call it pretermission * * * call it a license, call it a grant, disguise it as you may by cunning phraseology, looking to the dictionary for some words which can cover the true purpose and effect of this bill, and, after all, it is nothing but bestowing upon the State * * * that which she has not now, in order to enable her to regulate commerce among the States in violation of the Constitution of the United States." *Ibid.*, 5332.

What they have undertaken to say is this * * * that, recognizing the complete and exclusive control of congress over interstate and international commerce, congress may also by legislation declare that certain subjects shall not be for legislative purposes treated as subjects of interstate commerce."[55] He also found precedents for such legislation in the power of the States "by the permission of congress" to make their own quarantine laws, etc. As to this latter proposition Senator Hiscock maintained[56] that there is a wide difference between the subjects which are entirely within the jurisdiction of the States for certain purposes until congress takes that jurisdiction, and those over which the States have primarily no jurisdiction.[57]

When the constitutionality of the act was contested in Rahrer's case,[58] Chief Justice Fuller, in delivering the opinion of the court, although he cites the decisions in Bowan v. Railway Co., and Leisy v. Hardin as determining that commerce is free so long as congress has not passed any law "to regulate it specifically, or in such way as to allow the laws of the State to operate upon it," thereafter keeps clear of the "permission" and "consent" of those cases. After referring to the clause of the Constitution expressly authorizing the exercise of certain powers by the States with the consent of congress, he says: "Beyond this congress is not empowered to enable the State to go in this direction, nor can congress transfer legislative powers to a State nor sanction a State law in violation of the Constitution. * * * It does not admit of argument that congress can neither delegate its own powers nor enlarge those of a State. * * * Congress has not attempted to delegate the power to regulate commerce, or to grant a power not possessed by the States, or to adopt State laws. It has taken its own course and made its own regulation.[59] * * * The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of

[55] *Ibid.*, 4962–3.

[56] 21 Cong. Rec., 4962 (1890).

[57] See also *ibid*, 5324–5.

[58] In re Rahrer, 140 U. S. 545, 35 L. Ed., 572, 576 (1891).

[59] The court suggests, but does not decide, that this act might be justified on the local option principle.

property in the country or State. * * * Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the State laws in respect to imported packages in their original condition, created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction. * * * Jurisdiction attached, not in virtue of the law of congress, but the effect of the latter was to place the property where jurisdiction could attach."[60] Thus the idea of "permission" is repudiated. Congress does not act upon the *States* but upon *things*, so that what was interstate commerce prior to the legislation of congress has ceased in part to be such after that legislation. But the courts, the supreme court of the United States included, have been unable thoroughly to assimilate this doctrine, and persist in speaking of this act as *subjecting* interstate commerce to the power of the States,[61] as the *permission*[62] or *consent*[63] of congress or the *authority* from congress,[64] as *allowing* or *enabling* the States to act,[65] as *giving* power to the States,[66] as *conferring* power upon the States.[67] Later laws, modelled after the Wilson act and passed for similar purposes, but referring to the transportation of game[68] and oleomargarine[69] respectively, have developed no new doctrine, although the natural feeling that such legislation has actually added new power to the States is expressed more frankly than usual in the language of the Arkansas

[60] See also in re Rahrer, 43 Fed., 556 (1890); in re Van Vliet, 43 Fed. 761 (1890); in re Spickler, 43 Fed. 653, 657 (1890); North Dakota v. Fraser, 1 N. D. 425, 433 (1891); Indianapolis v. Bieler, 138 Ind. 30, 36 (1893); ex parte Edgerton, 59 Fed. 115, 118 (1893); ex parte Jervey, 66 Fed. 957, 960 (1895); Schollenberger v.Pennsylvania, 171. U. S. 1, 43 L. Ed. 49, 57 (1898).

[61] Indianapolis v. Bieler, 138 Ind., 30, 36 (1893).

[62] Ex parte Jervey, 66 Fed. 957, 960 (1895); Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49 (1898).

[63] In re Bergen, 115 Fed. 339, 342 (1900).

[64] People v. Hesterberg, 184 N. Y. 126, 132 (1906).

[65] Delameter v. South Dakota, 205 U. S., 93, 51 L. Ed. 724, 728 (1907).

[66] State v. Hanaphy, 90 N. W. (Ia) 601, 602 (1902).

[67] Pabst Brewing Co. v. Crenshaw, 198 U. S., 17, 49 L. Ed., 925, 929 (1905).

[68] Act of May 25, 1900, ch. 553, secs. 3, 5, 31 Stat. L. 187; House Rpt., 1899–1900, No. 474; 33 Cong. Rec. 4873; People v. Bootman, 180 N. Y., 1, 6 (1904).

[69] Act of May 9, 1902, ch. 784, sec. 1, 32 Stat. L. 193; 35 Cong. Rec. 1311, 1358, 1554, 3241; Schollenberger v. Pennsylvania, 171 U. S. 1, 43 L. Ed. 49, 57 (1898); United States v. Green, 137 Fed., 179, 187 (1905).

court,[70] to the effect that by the latter act "congress conferred upon the States * * * a police power not theretofore possessed."[71]

The exclusive power of congress to legislate concerning the disposal of the public lands has been affected, or interpreted, in a similar manner. An act of 1866 opens mineral lands to purchase "subject to such regulations as may be prescribed by law, and subject also to the local customs or rules of miners in the several mining districts, so far as the same may not be in conflict with the laws of the United States,"[72] and directs that as a condition of sale, "in the absence of necessary legislation by congress, the local legislature of any State or Territory may provide rules for working mines * * * and these conditions shall be expressed in the patent."[73] Further, an act of 1872[74] provides that "the miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location," etc., of mining claims.[75] Congress at the time apparently regarded these acts as "adopting" the local regulations then in existence and thereafter to be enacted, without raising any question of delegation of power.[76] And in the numerous cases in which these acts have been considered by the courts it seems that there is only one in which that objection has been suggested, although often the local regulations involved have been made subsequent to the acts of congress. The courts have regarded these acts as having "recognized these rules and customs as law,"[77] as a "surrender"

[70] Wells Fargo Express Co. v. State, 96 S. W. (Ark.) 189, 190 (1906.)

[71] See also Act of Aug. 1, 1888, ch. 729, 25 Stat. L. 357; Blair v. Ostrander, 109 Ia., 204, 208 (1899).

[72] Act of July 26, 1866, ch. 262, sec. 1, 14 Stat. L. 251; Act of May 10, 1872, ch. 152, sec. 1, 17 Stat. L. 91; Rev. Stats., sec. 2319. For the status of these local regulations prior to the act of 1866 see especially Jennison v. Kirk, 98 U. S. 453, 25 L. Ed. 791 (1879).

[73] Act of July 26, 1866, ch. 262, sec. 5, 14 Stat. L. 251, Rev. Stats., sec. 2338.

[74] Act of May 10, 1872, ch. 152, sec. 5, 17 Stat. L. 91, Rev. Stats., sec. 2324.

[75] See also Act of July 9, 1870, ch. 235, sec. 13, 16 Stat. L. 217, Rev. Stats., sec. 2332; Act of May 10, 1872, ch. 152, sec. 3, 17 Stat. L. 91, Rev. Stats., sec. 2322; Act of Mar. 1, 1893, ch. 183, 27 Stat. L. 507.

[76] Cong. Globe, 1865-6, pp. 3234, 3452; Cong. Globe, 1871–2, p. 2460.

[77] King v. Edwards, 1 Mont. 235, 239 (1870); McCormick v. Varnes, 2 Utah 355, 357 (1879).

of a right to the States,[78] as recognizing "the rights of the States to pass acts supplementing the mining act of congress."[79] In People v. District Court[80] it is said that "in so far as the provisions of the act may be regarded as conferring power upon the State legislature to regulate the manner of using and operating mining claims * * * it would seem * * * that the States already possessed this power. Being comparatively a new question, however, at the date of the passage of the congressional act, this and the other permissive clauses were properly and wisely inserted." In Mares v. Dillon,[81] the only case noticed in which the validity of the State regulations has been attacked on the ground of delegation of power, counsel emphasized the distinction between Territories and States in this particular, and between adopting existing regulations and those to be enacted in the future; but the court failed to consider the objection offered, and upheld the validity of the State regulations on precedents which have no bearing on the question of delegation of power. In Shoshone Mining Co. v. Rutter[82] the question involved pertained to jurisdiction and not constitutionality, but the decision in that case may be regarded as settling the law, putting as it does these acts of congress on the same footing with those regarding the regulation of interstate commerce above considered. The court says: "The recognition by congress of local customs and statutory provisions as at times controlling the right of possession does not incorporate them into the body of federal law;" and quotes from Rahrer's case:[83] "Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States, or to grant a power not possessed by the States, or to adopt State laws."[84] A similar construction had already been given by the same court to the act of 1886[85] providing that no railway-grant lands "shall be exempt from taxation by States, Territories, and municipal

[78] Woodruff v. Gravel Min. Co., 18 Fed. 753, 774 (1884).
[79] Mining Co., v. Allman, 23 Utah 410, 417 (1901).
[80] 11 Colo. 147, 154 (1887).
[81] 30 Mont. 117, 120 (1904).
[82] 177 U. S., 505, 44 L. Ed. 864, 865 (1900).
[83] Above, pp. 357-8.
[84] See also Trafton v. Noughes, Fed. Cas., No. 14, 134 (1877); Miller's Executors v. Swann, 150 U. S. 132, 37 L. Ed. 1028, 1029 (1893).
[85] Act of July 10, 1886, ch. 764, sec. 1, 24 Stat. L. 143.

corporations on account of the lien of the United States upon the same * * * or because no patent has been issued therefor." In commenting on this law in Central Pacific R. R. Co. v. Nevada,[86] the court says that "express authority was given to tax the lands," and then that the effect of this act was merely to remove the only obstacle to the enforcement of the State laws enacted prior to the act of congress.[87]

From the above confusing array of decisions and discussions in reference to such legislation it is apparent that the admission of unconstitutional delegation of legislative power has been avoided by several distinct lines of reasoning, alone or in combination.

1. The doctrine of National Bank v. Commonwealth, which radically modifies precedent long settled and practically divides anew the field of legislation between the United States and the States by a movable boundary line; and the doctrine distinctive of Rahrer's case, which shifts the effect of acts of congress from a delegation of power to the *States* to an operation on *things*, and thus, it would seem, opens indefinite possibilities to decentralization of legislative authority, are both, however well established they may be, unsatisfactory in theory and capable of abuse in practice.

2. The position, for which there is little authority indeed, that the State laws passed under such acts owe none of their validity to them, but are authorized solely by the inherent power of the States, has no foundation and cannot be maintained.

3. The most plausible justification of such legislation announced is that of the inherent power of the States to act upon the removal of restrictions by congress. But here there seems to be a confusion of this class of laws with the first class above discussed, and in fact the identity of the two classes has been asserted. Although the States are prevented from exercising certain powers which they have heretofore

[86] 162 U. S. 512, 40 L. Ed. 1057, 1060 (1896).

[87] Other acts of congress in regard to the public lands involving the same principles are: Act of May 23, 1844, ch. 17, 5 Stat. L. 657; Act of June 21, 1866, ch. 127, sec. 2, 14 Stat. L. 66, Rev. Stats., sec. 2292; Act of Mar. 2, 1867, ch. 177, 14 Stat. L. 541, Rev. Stats., sec. 2387. In decisions of the courts construing such acts, no considerations of delegation of power have been noticed, but their constitutionality appears not to have been questioned.

enjoyed, after congress has enacted legislation inconsistent therewith, and which, upon the repeal of that federal legislation, they again enjoy, it does not follow that a withdrawal of congress from a field not originally open to State legislation will leave the States free to act therein. The power of the States is subject to restrictions imposed by the Constitution, and it would seem that congress may not remove restrictions which congress has not imposed.

4. The most natural view of such acts as permission, grant, gift, etc., persistently recurring in court decisions, although sometimes there repudiated, can lead to nothing but confusion, for these expressions are mere substitutes for the impossible *delegation*. But the naturalness and persistence of this idea is itself proof of the extremely unsatisfactory character of the other solutions which have been offered—solutions of the problem how to prevent delegation of legistive power in fact from becoming delegation of legislative power in law.

III

Statutes of the class remaining to be considered effect an adoption of State laws as laws of the United States. They include laws governing federal courts, laws governing certain federal executive officers, and criminal laws. Statutes adopting "enacted" legislation of the States and thus involving no delegation of legislative power, are to be distinguished from such as adopt "potential" legislation of the States and thereby delegate legislative authority to the States.

1. By the terms of the judiciary act[88] "the laws of the several States, except where the Constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." The prospective character of this provision was early recognized by the courts, the court saying in Golden v. Prince,[89] that "the words of this section are general, so as to include, as well the laws of the respective States, which might there-

[88] Act of Sept. 24, 1789, ch. 20, sec. 34, 1 Stat. L. 73, Rev. Stats., sec. 721.
[89] Fed. Cas. No. 5, 509, p. 543 (1814).

after be passed, as those which were then in existence."[90] But the provision is satisfactorily explained as "the recognition of a principle of universal law; the principle that in every forum a contract is governed by the law with a view to which it was made."[91] "The truth is that * * * [this] is a declaratory act, announcing a general doctrine of international law, and the supreme court have so construed it."[92] Indeed it is held that "so far as concerns rights of property, it is the only rule that could be adopted by the courts of the United States, and the only one that congress had the power to establish."[93] Moreover, it considered that the courts of the United States in enforcing these State laws "are not foreign courts," but that the Constitution "has made them courts within the States to administer the laws of the States in certain cases."[94]

But the act contemplates legislation by congress directing a departure from the State laws as rules of decision, and the courts have held that they are bound by only such laws as have become rules of property and no further.[95] The State laws, then, which may be disregarded are not within the principle of universality and necessity, and hence it would seem that the prospective adoption of those laws could not be consistently justified against the objection of delegation of legislative power. At an early day it was decided[96] that the State laws of evidence in civil suits at common law are included in those laws which are adopted as rules of decision. So when congress enacted in 1862[97] that "the laws of the State in which the court shall be held shall be the rules of decision as to the competency of witnesses in the courts

[90] See also Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, 264 (1825).

[91] Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, 264 (1825).

[92] Hayden v. Oriental Mills, 15 Fed. 605, 606 (1883). See also Golden v. Prince, Fed. Cas., No. 5, 509, p. 543 (1814); ex parte Biddle, Fed. Cas., No. 1, 391 (1822); Bank v. Dudley's Lessee, 2 Pet. 492, 7 L. Ed. 496, 525 (1829); Hawkins v. Barney's Lessee, 5 Pet. 457, 8 L. Ed. 190, 193 (1831).

[93] United States v. Reid, 12 How. 361, 13 L. Ed., 1023 (1851).

[94] Tennessee v. Davis, 100 U. S., 257, 25 L. Ed. 648, 653 (1880).

[95] Swift v. Tyson, 16 Pet. 1, 10 L. Ed., 865 (1842). See also Boyce v. Tabb., 18 Wall. 546, 21 L. Ed. 757 (1873); Sandford v. Portsmouth, Fed. Cas., No. 12,315, p. 364 (1877).

[96] M'Niel v. Holbrook, 12 Pet. 84, 9 L. Ed. 1009, 1011 (1838); Potter v. National Bank, 102 U. S. 163, 26 L. Ed. 111 (1880).

[97] Act of July 16, 1862, ch. 189, sec. 1, 12 Stat. L. 588, Rev. Stats., sec. 858.

of the United States, in trials at common law, in equity, and admiralty," it simply extended the principle to equity and admiralty cases.[98] And this act has always been assumed to be prospective in operation.[99] It would seem, then, that either the principle of "universal law" applies also, to a certain extent at least, to suits in equity and admiralty, in which case it was very late indeed in receiving proper recognition, or that the prospective operation of the law in regard to such trials constitutes a delegation of power.

In Wayman v. Southard[100] Chief Justice Marshall held that the provision for "rules of decision" cannot apply to State procedure, as that provision is prospective in character. "The State assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the Constitution vests in congress, and cannot receive it by delegation. * * * If, then, it [this provision] embraces the rules of practice, the modes of proceedings in suits; if it adopts future State laws to regulate the conduct of the officer in the performance of his official duties, it delegates to the State legislatures the power which the Constitution has conferred on congress." But there has been very much inconsistency indeed in applying this principle in various acts governing the procedure of United States courts.

The first of the "process acts"[101] was passed in the same year as the provision which has just been discussed. This temporary law directs that "the forms of writs and executions, except their style, and modes of process * * * in the circuit and district courts, in suits at common law, shall be the same in each State respectively as now are used or allowed in the supreme courts of the same." In 1792 this provision was practically reënacted,[102] but reference was still made to the State laws of 1789, and these were made subject to alteration by the United

[98] Cong. Globe, 1861–2, p. 3261; Robinson v. Mundell, Fed. Cas., No. 11, 959, pp. 1027, 1029, (1868); United States v. Brown, Fed. Cas., No. 14, 671, p. 1275 (1871).

[99] E. g., United States v. Brown, Fed. Cas. No. 14, 671, p. 1275 (1871); Packet v. Clough, 20 Wall. 528, 22 L. Ed. 406, 407 (1874).

[100] 10 Wheat. 1, 6 L. Ed. 253, 264 (1825).

[101] Act of Sept. 29, 1789, ch. 21, 1 Stat.L. 93. Continued to 1792. Act of May 26, 1790, ch. 13, 1 Stat. L. 123; Act of Feb. 18, 1791, ch. 8, 1 Stat. L. 191; Act of May 8, 1792, ch. 36, sec. 8, 1 Stat. L. 275.

[102] Act of May 8, 1792, ch. 36, sec. 2, 1 Stat. L. 275.

States courts. These acts were clearly not prospective in operation, and of course no changes in the State laws were binding on the federal courts,[103] but it was apparently assumed in Bank of United States v. Halstead[104] that congress might have allowed such prospective operation. Since the act was not applicable to States which had later entered the Union,[105] a similar statute was enacted in 1828[106] for those States.[107] But as this act, too, was not prospective in character,[108] although in Oelrich v. Pittsburg[109] it is again intimated that congress might well have made it so, the same difficulty arose again and was similarly met by the act of 1842.[110] This act makes the provisions of the act of 1828 applicable to States admitted since the passage of the act of 1842.

A new provision, first introduced in the special legislation for Louisiana,[111] was embodied in the act of 1828,[112] permitting the courts for the several States by rules "so far to alter final process in said courts as to conform the same to any change which may be adopted by the legislatures of the respective States for the State courts."[113] Further, in 1872[114] other procedure heretofore required by the process acts to conform to the State regulations in force at the time of the passage of those acts

[103] Cf. Wayman v. Southard, 10 Wheat. 1, 6 L. Ed. 253, 260 (1825); Ross v. Duval, 13 Pet. 45, 10 L. Ed., 51, 57 (1839).

[104] 10 Wheat 51, 6 L. Ed. 264, 266 (1825).

[105] Fullerton v. Bank of United States, 1 Pet., 604, 7 L. Ed., 280, 284 (1828). See also argument of counsel in Wayman v. Southard, 10 Wheat. 1, 6 L. Ed., 253, 256 (1825).

[106] Act of May 19, 1828, ch. 68, sec. 1, 4 Stat. L. 278.

[107] Beers v. Haughton, 9 Pet. 329, 357 (1835); Ross v. Duval, 13 Pet. 45, 10 L. Ed. 51 (1839).

[108] Cf. Beers v. Haughton, 9 Pet. 329, 9 L. Ed. 145, 158 (1835); Shrew v. Jones, Fed. Cas. No. 12, 818, p. 41 (1840); Catherwood v. Gapete, Fed. Cas. No. 2, 513 (1854).

[109] Fed. Cas. No. 10, 444, p. 600 (1859). In congress an attempt was made to strike out the word "now," in order to include State laws to be passed in the future. 4 Cong. Debates 583. See Rowan's distinction between the adoption of the "potential legislation" of the States and the adoption of their "exerted will." *Ibid.*, 358, 360.

[110] Act of Aug. 1, 1842, ch. 109, 5 Stat. L. 499.

[111] Act of May 26, 1824, ch. 181, sec. 1, 4 Stat. L. 62.

[112] Sec. 3.

[113] The same principle is contained in the law at present. Act of June 1, 1872, ch. 255, sec. 6, 17 Stat. L. 196, Rev. Stats., sec. 916.

[114] Act of June 1, 1872, ch. 255, sec. 5, 17 Stat. L. 196, Rev. Stats., sec. 914.

but subject to alteration by the United States courts, was made "to conform as near as may be" to the procedure "existing at the time in like causes" in the State courts, "any rule of the court to the contrary notwithstanding." Such discretionary power as is allowed in these provisions has not prevented the courts from recognizing the obligatory force of changes in the State procedure. It is admitted in Fink v. O'Neil[115] that the act of 1828 restricted the former discretionary power of the courts, preventing them thereafter from departing from the State procedure of the time unless to adopt changes made by the States. And it is also acknowledged that procedure regulated by the act of 1872 "must * * * follow subsequent changes in the procedure in like causes in the State courts."[116] "While the act * * * is to a large extent mandatory, it is also to some extent only directory and advisory."[117] The federal courts had not used their power, as much as they might, to modify the antiquated State regulations and thus establish a uniformity between the federal and the contemporary State practice, and it was the purpose of the act of 1872 to bring about such a uniformity.[118] Since, then, these State provisions have an obligatory force, whatever its extent, upon the courts of the United States, it would seem that congress has in effect prospectively adopted State laws for the guidance of those courts. In such legislation there is apparently an attempt to find a legal middle ground between leaving everything to the discretion of the courts on the one hand, and an unconstitutional delegation of legislative power to the States on the other.[119] The validity of this legislation and other legislation of a similar character[120] has been assumed without question by the

[115] 106 U. S. 272, 27 L. Ed., 196, 198 (1882).

[116] Lamaster v. Keeler, 123 U. S., 376, 31 L. Ed., 238, 241 (1887).

[117] Indianapolis & St. L. R. R. Co., v. Horst, 93 U. S., 291, 23 L. Ed., 898, 901 (1876). See also Sandford v. Portsmouth, Fed. Cas., No. 12, 315, p. 365 (1877); ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117, 1120 (1885).

[118] Nudd v. Burrows, 91 U. S. 426, 23 L. Ed. 286, 290 (1875).

[119] Cf. Cong. Globe, 1872–3, p. 2493.

[120] Act of Mar. 14, 1848, ch. 18, 9 Stat. L. 213 (Cf. Cong. Globe, 1847-8, p. 196), Rev. Stats., sec. 933; Act of June, 1872, ch. 255, sec., 6, 17 Stat. L. 196, Rev. Stats., sec. 915; Act of Aug. 1,1888, ch. 728, 25 Stat. L. 357; Act of Mar. 1, 1889, ch. 333, sec. 6, 25 Stat. L. 783; Act of Aug. 18, 1890, ch. 797, sec. 1, 26 Stat. L. 316.

courts.[121] Even an act of 1892[122] making it "lawful to take the depositions or testimony of witnesses in the mode prescribed by the laws of the State in which the courts are held," has been assumed to be valid though regarded as prospective in operation.[123]

A law of 1839,[124] directs that "no person shall be imprisoned for debt in any State, on process issuing out of a court of the United States, where by the laws of such State, imprisonment for debt has been abolished; and where by the laws of a State, imprisonment for debt shall be allowed, under certain conditions and restrictions, the same conditions and restrictions shall be applicable to the process issuing out of the courts of the United States; and the same proceedings shall be had therein, as are adopted in the courts of such State." Because at least the first clause of this act had been declared[125] to be not prospective in operation, and hence not applicable to State laws passed after its enactment, the act was in 1841[126] construed by congress "to abolish imprisonment for debt, on process issuing out of any court of the United States, in all cases whatever, where, by virtue of the laws of the State in which such court shall be held, imprisonment for debt has been, or shall hereafter be, abolished."[127] Since this act was silent on the clause of the act of 1839 providing for modifications of imprisonment for debt, it was held that the latter was not made prospective by the act of 1841, the court at the same time expressing doubts as to the power of congress to "adopt prospectively, future legislation of the several States abolish-

[121] E. g., Gaines v. Travis, Fed. Cas., No. 5, 180, p. 1064 (1849); Low v. Durfee, 5 Fed. 256, 259 (1880); in re Secretary of Treasury of United States, 45 Fed. 396 (1891).

[122] Act of Mar. 9, 1892, ch. 14, 27 Stat. L. 7.

[123] Mulcahey v. Lake Erie and W. R. Co., 69 Fed. 172 (1895).

[124] Act of Feb. 28, 1839, ch. 35, 5 Stat. L. 321.

[125] "By at least one of the courts" (opinion not found in reports). "A letter from a judge of the supreme court * * * stated that to be the proper construction, according to the uniform decisions of that high tribunal in similar cases." 8 Cong. Globe 251 (1840); 9 Cong. 41 (1841). See also in re Freeman, Fed. Cas. No. 5,083, p. 752 (1855). United States v. Walsh, Fed. Cas. No. 16, 635, p. 393 (1867).

[126] Act of Jan. 14, 1841, ch. 2, 5 Stat. L. 410.

[127] Mr. Adams, in the house, urged "some constitutional objections" to the bill in this form, and offered an amendment to strike out "or shall be hereafter." But the result of the debate which followed, "involving split-hair distinctions in matters of law," was the rejection of the amendment. 9 Cong. Globe 96 (1841). A similar bill had passed the house at the last session, 8 Cong. Globe 251 (1840).

ing imprisonment for debt."[128] On this account, the State laws on the subject having undergone changes since 1839, and the laws of 1839 and 1841 not applying at all to States since admitted,[129] an act of 1867[130] provides that all modifications, etc., of imprisonment for debt, "now existing[131] by the laws of any State, shall be applicable to process issuing out of the courts of the United States therein, and the same course of proceedings shall be adopted as now are or may be in the courts of such States." The act thus adopts the modifications, etc., "then existing by the laws of the several States, and the course of proceedings which shall thereafter be adopted therein."[132] The Revised Statutes[133] have substituted "provided" for "now existing," and "may be," for "now are or may be." The whole provision is thus now apparently prospective in application. Such legislation is regarded as valid in Gaines v. Travis[134] where it is said that "there is no doubt that congress may, by clear enactment, adopt prospective legislation of the States, and impart to it the effect of an act of the national government," and hence that in case of a repeal of the State code of practice, the latter would "*eo instanti* cease to have influence over the proceedings of the United States courts."

By each of the acts of congress on the subject[135] it is provided that persons imprisoned on process issuing from United States courts in civil actions shall be entitled to the same privileges of jail yards as persons so imprisoned under State authority "are[136] entitled to, and under the like regulations and restrictions." The validity of the pro-

[128] In re Freeman, Fed. Cas., No. 5, 083, p. 751 (1855). See also United States v. Walsh, Fed. Cas., No. 16, 635, p. 393 (1867).

[129] Hanson v. Fowle, Fed. Cas., No. 6, 041, p. 466, (1871).

[130] Act of Mar. 2, 1867, ch. 180, 14 Stat. L. 543.

[131] The original bill here inserted "or which may hereafter be adopted," but these words were struck out upon the recommendation of the senate committee on judiciary. Cong. Globe, 1866–7, p. 1579.

[132] United States v. Tetlow, Fed. Cas., No., 16, 456, p. 44 (1872).

[133] Sec. 990. See also first part of the act of 1867, embodied in Rev. Stats., sec. 991.

[134] Fed. Cas., No. 5, 180, p. 1064, (1849).

[135] Act of May 5, 1792, ch. 29, sec. 1, 1 Stat. L. 265; Act of May 30, 1794, ch. 34, 1 Stat. L. 370; Act of May 28, 1796, ch. 38, sec. 1, 1 Stat. L. 482; Act of Jan. 6, 1800, ch. 4, sec. 1, 2 Stat. L. 4; Rev. Stats., sec. 992.

[136] The "now" of the early process acts is here omitted. Cf. counsel in United States v. Knight, 14 Pet. 301, 10 L. Ed. 465, 468 (1840).

vision was assumed in United States v. Noah,[137] although apparently[138] it was regarded as prospective in operation. But Justice Story in United States v. Knight[139] construed it as not prospective, saying: "I entertain very serious doubts, whether congress does possess a constitutional authority to adopt prospectively State legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power. * * * At all events, I should not be disposed to give such a construction to any act of congress, unless it was positively required by its words and its intent; which, it seems to me, cannot be affirmed of the act of 1800." The supreme court also held[140] that the act was not prospective, but did not consider the question of delegation of power in the opinion as reported.[141]

The bankruptcy act of 1867,[142] after enumerating certain classes of property as exempted from process, adds "such other property * * * as is exempted * * * by the laws of the State * * * in force in the year eighteen hundred and sixty-four;" but on account of changes in State laws[143] this date was later made 1871.[144] In the present bankruptcy law[145] there is a change of principle, and it is provided, as had been suggested in the discussion of the bill of 1867,[146] that the act "shall not affect the allowance to bankrupts of the exemptions which are prescribed by the State laws in force at the time of filing the petition." Further, not only the acts mentioned but the previous acts on the subject,[147] recognize State laws in regard to priority, liens, etc., future State laws being doubtless included.[148] There is very little

[137] Fed. Cas., No. 15,894, p. 177 (1825).

[138] Cf. counsel in United States v. Knight, 14 Pet. 301, 10 L. Ed. 465, 468 (1840).

[139] Fed. Cas., No. 15,539, p. 797 (1838).

[140] United States v. Knight, 14 Pet. 301, 10 L. Ed. 465, 472 (1840).

[141] See argument of counsel in the case to show the prospective character of the act and the power of congress to pass such an act.

[142] Act of Mar. 2, 1867, ch. 176, sec. 14, 14 Stat. L. 517.

[143] Cong. Globe, 1871–2, p. 4182.

[144] Act of June 8, 1872, ch. 339, 17 Stat. L. 334.

[145] Act of July 1, 1898, ch. 541, sec. 6, 30 Stat. L. 544.

[146] A proposed amendment to the bill substituted "at the time when such proceedings shall have been commenced" for "in the year 1864." Cong. Globe, 1866–7, p. 955.

[147] Act of Apr. 4, 1800, ch. 19, 2 Stat. L. 19; Act of Aug. 19, 1841, ch. 9, 5 Stat. L. 440.

[148] Cf. in re Stuyvesant Bank, Fed. Cas., No. 12,919 (1874).

precedent considering the validity of such provisions from the point of view of delegation of legislative power. In the important case of Hanover Bank v. Moyses[149] Chief Justice Fuller does not state the grounds upon which the opinion of the court was based: "Nor can we perceive in the recognition of the local law in the matter of exemption, dower, priority of payments and the like, any attempt by congress to unlawfully delegate its legislative power." But he cites Rahrer's case,[150] and it is thus possible that he justifies such legislation partly by the concurrent power of the States to pass insolvency laws and thus places such legislation in the class discussed in the preceding section. If so he departs very widely indeed from the heretofore accepted view that the provisions of the bankruptcy acts in reference to exemptions simply continue the policy as to exemptions in general followed by the federal courts in the execution of judgments under the process acts.[151] If the latter view is correct, the same considerations will apply to the exemption provisions as to those process acts.

The criminal procedure also of the federal courts has been affected to some extent by similar legislation. Chief Justice Taney,[152] in refusing to include the State law of evidence in criminal cases in the "rules of decision" for the federal courts, said: "But it could not be supposed, without very plain words to show it, that congress intended to give to the States the power of prescribing the rules of evidence in trials for offenses against the United States. For this construction would in effect place the criminal jurisprudence of one sovereignty under the control of another. It is evident that such could not be the design

[149] 186 U. S. 181, L. Ed. 1113, 1120 (1902).

[150] Above, pp. 357-8.

[151] In re Hopkins, Fed. Cas., No. 6,683, p. 490 (1856); in re Ruth, Fed. Cas., No. 12,172, p. 95 (1867); in re Wyllie, Fed. Cas., No. 18,112, p. 735 (1872); in re Smith, Fed. Cas., No. 12,996, p. 413 (1876); Richardson v. Woodward, 104 Fed. 873, 874 (1900); Steele v. Buel, 104 Fed. 968, 972 (1900). Cf. Act of June 1, 1872, ch. 255, sec. 14, 17 Stat. L. 198, Rev. Stats., secs. 1042, 5296. The force of State laws in the civil procedure of the federal courts is further seen in Act of July 4, 1840, 5 Stat. L., 393, Rev. Stats., sec. 962; Act of Aug. 23, 1842, ch. 188, sec. 8, 5 Stat. L. 516, Rev. Stats., sec. 966; Perkins v. Fourquinet, 14 How. 328, 14 L. Ed. 441, 443 (1852); Railroad Co. v. Tobriner, 147 U. S. 571, 37 L. Ed., 284, 290 (1893). See also above, p. 359, note 71.

[152] United States v. Reid, 12 How. 361, 13 L. Ed. 1023, 1024 (1851).

of this act of congress." But the judiciary act[153] had long before provided for the arrest, imprisonment, and bail of offenders against the laws of the United States by certain judicial officers "agreeably to the usual mode of process against offenders in such State." And this section has been applied in many decisions, in which its prospective nature is expressly asserted or distinctly assumed by the courts, without its constitutionality being questioned.[154] Moreover an act of 1798[155] gives such officers "the like power and authority to hold to security of the peace, and for good behaviour * * * as may or can be lawfully exercised by any judge or justice of the peace of the respective States, in cases cognizable before them." And the latter act seems to be regarded in the same way as the former. Finally, a law of 1872[156] provides that in "all criminal or penal causes in which judgment or sentence has been or shall be rendered, imposing the payment of a fine or penalty * * * the said judgment * * * may be enforced against the property of the defendant in like manner as judgments in civil cases are enforced." For a criticism of this provision, then, reference is made to the discussion of the provisions regarding final process in civil actions.[157]

Similar principles and similar difficulties appear in legislation in regard to jurors in federal courts. The judiciary act[158] directs that jurors in the United States courts shall be designated in each State respectively "according to the mode of forming juries therein now practiced," so far as practicable, and that they "shall have the same qualifications as are requisite for jurors by the laws of the State of which they are citizens, to serve in the highest courts of law in such State." Since at least the provision for the designation of jurors was not prospective in application, and since changes had later been made in the mode of selecting jurors in the different States, and new States had been

[153] Act of Sept. 24, 1789, ch. 20, sec. 33, 1 Stat. L. 73, Rev. Stats., sec. 1014.

[154] E. g., United States v. Rundlett, Fed. Cas., No. 16,208 (1854); in re Dana, 68 Fed. 886,893 (1895); United States v. Zarafonitis, 150 Fed. 97,100 (1907).

[155] Act of July 16, 1798, ch. 83, 1 Stat. L. 609, Rev. Stats., sec. 727.

[156] Act of June 1, 1872, ch. 255, 17 Stat. L. 198, Rev. Stats., sec. 1041.

[157] Above, pp. 364-70. See the recommendation of the commission to revise the federal criminal law to extend the principle of conformity in civil actions to criminal actions. Senate Rpt., 1901–2, No. 68, Pt. 1, p. 287.

[158] Act of Sept. 24, 1789, ch. 20, sec. 29, 1 Stat. L. 73.

admitted in the meantime,[159] this provision was practically reënacted by the law of 1800,[160] so far as concerns the designation of jurors. For a similar reason[161] the act of 1840[162] was necessary. But this act makes the provision for qualifications as clearly not prospective as it does that for designation prospective,[163] providing that federal jurors "shall have the same qualifications, and be entitled to the same exemptions, as jurors of the highest courts of law of such State now have and are entitled to, and shall be designated * * * according to the mode of forming such juries now practiced and hereafter to be practiced therein," so far as practicable; and the courts of the United States "shall have power to make all necessary rules and regulations for conforming the designation and empanelling of jurors, in substance to the laws and usages now in force in such States; and further, shall have power, by rule or order, from time to time, to conform the same to any change which may hereafter be adopted by the legislatures of the respective States for the State courts." In the Revised Statutes[164] the clause relating to qualifications and exemptions is also made clearly prospective, the jurors of the federal courts having the same qualifications (with certain restrictions) and being entitled to the same exemptions as jurors of the highest State court of law "may have and be entitled to at the time when such jurors for service in the courts of the United States are summoned." Although the courts thus have a discretionary power in regard to the mode of designating and empanelling, which they do not have in regard to qualifications and exemptions,[165] the real force of State legislation is apparent, whether we say that congress "adopts" the State laws with respect

[159] United States v Price, Fed. Cas., No. 16,088 (1810).

[160] Act of May 13, 1800, ch. 61, 2 Stat. L. 82.

[161] United States v. Woodruff, Fed. Cas., No. 16,758 (1846); United States v. Stowell, Fed. Cas., No. 16,409, p. 1354 (1854); United States v. Richardson, 28 Fed. 61, 68 (1886).

[162] Act of July 20, 1840, ch. 47, 5 Stat. L. 394.

[163] Cf. United States v. Douglas, Fed. Cas., No. 14,989 (1851); United States v. Richardson, 28 Fed. 61, 68 (1886).

[164] Sec. 800. See also the special legislation for Pennsylvania: Act of Mar. 19, 1842, ch. 7, 5 Stat. L. 471; Act of Mar. 3, 1849, ch. 118, 9 Stat. L. 403; Act of June 30, 1879, ch. 52, sec. 2, 21 Stat. L., 43.

[165] Cf. United States v. Wilson, Fed. Cas., No. 16,737 (1855).

to the former,[166] or use the language of the court in United States v. Collins,[167] to the effect that congress "does not adopt the respective State laws, but only requires conformity to them in certain respects, and then gives the courts power to make rules for the attainment of such conformity in substance as far as practicable."[168] The same objections will apply here as apply to the process acts described above,[169] which are based upon exactly the same principle, but the validity of this legislation has been assumed, apparently without question.[170]

In these various acts relating to the procedure and the jurors of the courts of the United States, congress has thus in some instances very carefully avoided any recognition of State laws to be enacted in the future, sometimes at least, to avoid an unconstitutional delegation of legislative authority, but in others has clearly adopted such laws, either directly or by thrusting the federal courts as a *tertium quid* between congress and the States. And the courts are no less inconsistent, sometimes declaring an act to be not prospective in operation in order to avoid a delegation of legislative power, but more often considering an act of exactly the same form to be prospective, and expressly declaring or clearly assuming such legislation to be valid, usually without an attempt to explain such validity.

2. The force of State legislation is further seen in acts of congress in reference to certain executive officers of the United States. The case of the marshals is the most important. "The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." This provision of the Revised Statutes[171] is practically the same as that of the original

[166] United States v. Woodruff, Fed. Cas., No. 16,758 (1846).

[167] Fed. Cas., No. 14,837, p. 546 (1873).

[168] See also Alston v. Manning, Fed. Cas., No. 266, p. 576 (1869); Pointer v. United States, 151 U. S. 396, 38 L. Ed. 208, 213 (1894); 9 Cong. Rec. 2007–8 (1879).

[169] Pp. 365-70.

[170] E. g., United States v. Reed, Fed. Cas., No. 16,134 (1852); United States v. Stowell, Fed. Cas., No. 16,409 (1854); United States v. Richardson, 28 Fed. 61, 68 (1886). See also Act of Apr. 29, 1802, ch. 31, 2 Stat. L. 167, Rev. Stats., sec. 805.

[171] Sec. 788.

act of 1795,[172] and of the act of 1861,[173] with the exception that "may have" is substituted for "have." But the prospective character of the section, in either form, has generally been assumed by the courts, and even for States admitted into the Union since the enactment of the provision, without any suggestion of the invalidity of such legislation;[174] and when the provision has not been construed to be "perambulatory," it has been assumed that congress could have made it so.[175] The marshal's fees, too, have been determined, in whole or in part, by such rates "as are now used or allowed,"[176] "as are allowed,"[177] and finally "as are or shall be allowed,"[178] for similar services by the States. Although the prospective operation of the law at the second stage seems to have been doubted in The Trial,[179] both its prospective operation and its validity were apparently generally assumed without question;[180] and there seems to have been no intimation of the invalidity of the present law, even in States admitted since its enactment.[181]

An act of 1796[182] authorized the president to direct certain officers of the United States "to aid in the execution of quarantine,

[172] Act of Feb. 28, 1795, ch. 36, 1 Stat. L. 424.

[173] Act of July 29, 1861, ch. 25, 12 Stat. L. 282.

[174] Ex parte Ringgold, Fed. Cas., No. 11,841 (1827); Hyman v. Chales, 12 Fed. 855 (1882); in re Acker, 66 Fed. 290, 294, 296 (1894); John Bad Elk v. United States, 177 U. S. 529, 44 L. Ed. 874, 876 (1900). Clearly expressed in State v. Williams, 72 Miss. 992, 993 (1895).

[175] *The E. W. Gorgas*, Fed. Cas., No. 4, 585 (1879).

[176] Act of Sept. 29, 1789, ch. 21, sec. 2, 1 Stat. L. 93.

[177] Act of May 8, 1792, ch. 36, sec. 3, 1 Stat. L. 275; Act of Feb. 28, 1799, ch. 19, sec. 1, 1 Stat. L. 624.

[178] Act of Feb. 26, 1853, ch. 80, sec. 1, 10 Stat. L. 161, 164, Rev. Stats., sec. 829.

[179] Fed. Cas., No. 14, 170, p. 190 (1830).

[180] Townsend v. United States, Fed. Cas., No. 14,119, p. 106 (1822). Pomroy v. Harter, Fed. Cas., No. 11,263 (1839).

[181] E. g., Amato v. Jacobus, 58 Fed. 855 (1893); Dexter v. Sayward, 78 Fed. 275, 276 (1897). So, until 1883, it is provided that the clerk of the supreme court shall receive, in part, "double the fees of the clerk of the supreme court of the State in which the supreme court shall be holden." Act of May 8, 1792, ch. 36, sec. 3, 1 Stat. L. 275; Act of Feb. 28, 1799, ch. 19, sec. 9, 1 Stat. L. 624; Act of Mar. 3, 1883, ch. 143, 22 Stat. L. 603, 631; 4 Compt. Dec. 101, note (1876–7). And when justices of the peace and other committing magistrates render services in cases of violation of the laws of the United States, though there is no statute of the United States regulating their fees, it is held that charges for such services must be made under the State or territorial fee bill. 1 Compt. Dec. 54; Senate Doc., 1906–07, No. 395, pp. 277–8.

[182] Act of Feb. 25, 1796, ch. 31, 1 Stat. L. 474.

and also in the execution of the health laws of the States." The same principle was followed in the act of 1799,[183] which is substantially in force at present,[184] in which it is required that the quarantine and other restraints "which shall be required and established by the health laws of any State, or pursuant thereto, respecting any vessels * * * shall be duly observed" by such officers, and they are directed faithfully "to aid in the execution of such quarantines and health laws." These acts are not only a recognition of the inherent police powers of the States, but they also make the State laws rules of action for officers of the United States. The object of such legislation was "to conform the custom-house regulations of the United States to the quarantine laws of the different States, so far as this could be done consistently with the safety of the revenue; to command the assistance of the officers of the United States in the enforcement of those State laws."[185] It "clearly recognizes the quarantine laws of the States, and requires of the officers of the treasury a conformity to their provisions in dealing with vessels affected by the quarantine system. And this very clearly has relation to laws enacted after the passage of that statute, as well as to those then in existence."[186] But nevertheless the courts do not suggest that any delegation of legislative power has been attempted.

3. Finally, State criminal laws too do service as laws of the United States. By an act of 1825[187] it is required that persons committing offenses in any place ceded to and under the jurisdiction of the United States, the punishment of which is not provided for by the laws of the United States, shall receive the same punishment as the laws of the State in which the place "is situated, provide for the like offense when committed * * * within such State." The reasoning upon which Chief Justice Marshall based the decision in United States v.

[183] Act of Feb. 25, 1799, ch. 12, 1 Stat. L. 619.

[184] Rev. Stats., secs. 4792–6.

[185] Quarantine at Alexandria, 2 Op. Atty.-Gen., 263, 264 (1829).

[186] Morgan v. Louisiana, 118 U. S., 455, 30 L. Ed., 237, 242 (1886). See also Bartlett v. Lockwood, 160 U. S. 357, 40 L. Ed. 455, 457 (1896). For legislation containing the same principle see Act of Feb. 28, 1803, ch. 10, sec. 3, 2 Stat. L. 205; Act of Apr. 29, 1878, ch. 66, sec. 2, 20 Stat. L. 37. 20 Op. Atty.-Gen. 467; Act of Feb. 15, 1893, ch. 114, sec. 3, 27 Stat. L. 449.

[187] Act of Mar. 3, 1825, ch. 65, secs. 1, 3, 4 Stat. L. 115.

Paul[188] is not reported, but the court decides that this provision "is to be limited to the laws of the several States in force at the time of its enactment." And this "has been accepted as the law from that day to this."[189] Indeed the later acts of congress on the subject expressly refer to the State laws "now in force."[190] Doubtless the chief justice considered an unconstitutional delegation of legislative power involved in a prospective construction of the provision,[191] and this objection was later expressly stated in United States v. Barnaby.[192] In United States v. Curran[193] the provision was held not to apply to States admitted since its enactment. Similar legislation,[194] subjecting persons convicted of certain crimes on reservations in South Dakota "to the same penalties and punishment as are other persons convicted of either of said crimes under the laws of the State of South Dakota," has been interpreted in a similar manner: "It employs the present tense. * * * It does not purport to delegate to the State * * * authority at any time in the future, to fix *ad libitum*, the punishment of federal offenses. This it could not do. Congress seems to have been willing to adopt the punishment as fixed in 1903 by the laws of South Dakota * * * and such adoption was, in our opinion, competent legislation."[195]

But this doctrine has not been applied to certain other legislation of this nature. An act of 1834[196] provides that criminals convicted of offenses against the United States, confined in State or territorial prisons "shall * * * in all respects be subject to the same discipline and treatment, as convicts sentenced by the courts of the State or Territory * * * and while so confined therein, shall also be exclusively under the control of the officers having charge of the same, under the laws

[188] 6 Pet. 141, 8 L. Ed. 348 (1832).

[189] Hollister v. United States, 145 Fed. 773, 779 (1906). See also United States v. Barney, Fed. Cas., No. 14, 524, p. 1013 (1866).

[190] Act of Apr. 5, 1866, ch. 24, sec. 2, 14 Stat. L. 12, Rev. Stats., sec. 5391; Act of July 7, 1898, ch. 576, sec. 2, 30 Stat. L. 717.

[191] Cf. above, pp.

[192] 51 Fed. 20, 23 (1892). See also House Ex. Doc., 1893, No. 14.

[193] *Ibid.*, p. 5.

[194] Act of Feb. 2, 1903, ch. 351, sec. 3, 32 Stat. L. 793.

[195] Hollister v. United States, 145 Fed. 773, 779 (1906).

[196] Act of June 30, 1834, ch. 163, 4 Stat. L. 739, Rev. Stats., sec. 5539.

of the said State or Territory." Likewise, an act of 1870[197] entitles the convicts "to the same system of credits for good behavior as other persons confined in the same prison." Apparently no objection has been raised against the prospective operation of these provisions but this has been assumed in various judicial decisions.[198] The same[199] is true of the enforcement act of 1870, both as to the sections repealed in 1894[200] which in effect adopt State laws in reference to federal elections by adding penalties to the breach thereof,[201] and as to the sections which, after specifying penalties for certain offenses under the act, direct that offenders against other provisions of the act "shall be punished for the same with such punishments as are attached to the said felonies, crimes and misdemeanors by the laws of the State in which the offense may be committed."[202]

* * *

It then appears from this discussion that although the accepted doctrine in regard to the unconstitutionality of the delegation of legislative power has never been expressly denied in this connection, but at times has been clearly stated and strictly applied, more often there have been attempts to avoid a conflict with the theory by indirect legislation or forced construction, or the theory has been utterly ignored, with the result that relations between the Union and the States, supposedly determined by the Constitution, have been altered by the action of congress.

[197] Act of June 14, 1870, ch. 128, 16 Stat. L. 151, Rev. Stats., sec. 5544.

[198] E. g., in re Willis, 83 Fed. 148, 150 (1897); in re Walters, 128 Fed. 791, 795 (1904).

[199] E. g., in re Coy, 31 Fed. 794; 32 Fed. 542; 127 U. S., 731, 32 L. Ed. 274 (1887); United States v. O'Connor, 31 Fed. 449 (1887); United States v. Logan, 45 Fed. 872, 888 (1891); Motes v. United States, 178 U. S., 458, 44 L. Ed. 1150, 1151 (1900). But see the objections to such legislation made by the commission to revise the criminal law of the United States. Senate Doc., 1900–1, No. 68, Part 2, p. viii.

[200] Act of Aug. 8, 1894, ch. 25, sec. 1, 28 Stat. L. 36.

[201] Ex parte Siebold, 100 U. S., 371, 25 L. Ed., 717, 723 (1879).

[202] Act of May 31, 1870, ch. 114, secs. 5–7, 16 Stat. L. 140, Rev. Stats., secs. 5507–9.